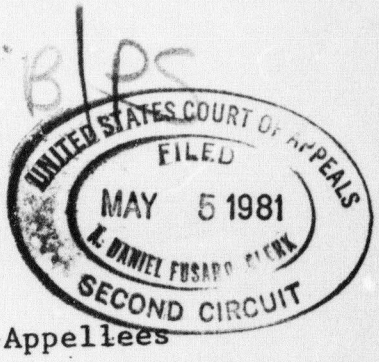
United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7177

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT



JOHN F. MEEHAN and ROBERT W. FINK
d/b/a MEEHAN & FINK,

Plaintiffs-Appellees

-against-

JOHN SNOW and JUDY SNOW,

Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF OF DEFENDANTS-APPELLANTS

VOGEL AND ROSENBERG
41 East 42nd Street
New York, New York 10017
(212) 599-3337
Attorneys for Defendants-Appellants

McCANN, RIDER, DRAKE, WEINER, SOMMERS
and LOEB, P.C.
427 Little Britain Road
Post Office Box 991
Newburgh, New York 12550
(914) 562-8700
Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

Page

ARGUMENT.....

POINT I: THE NEW ISSUES RAISED BY PLAINTIFFS IN THEIR APPELLATE BRIEF SHOULD NOT BE CONSIDERED BECAUSE THEY WERE NOT RAISED BELOW..... 1

POINT II: PLAINTIFFS' CONTENTION THAT BOTH DEFENDANTS AND THEIR COUNSEL ENGAGED IN A CONTINUUS COURSE OF DILATORY CONDUCT IS BASED ON IRRELEVANT, MISLEADING AND FALSE ALLEGATIONS..... 3

POINT III: THE DISTRICT COURT'S APPLICATION OF THE WRONG STANDARD TO MEASURE "EXCUSABLE NEGLECT" UNDER RULE 60(b)(1) CAUSED IT TO CAPRICIOUSLY FIND THAT A SHORT DEFAULT IN PLEADING CAUSED BY COUNSEL'S INNOCENT MISTAKE OF LAW WAS NOT EXCUSABLE DESPITE THE CIRCUIT COURT DECISIONS WHICH HAVE CONSISTENTLY FOUND THAT THE DEFAULTING PARTY WAS ENTITLED TO A FINDING OF "EXCUSABLE NEGLECT" UNDER SUCH CIRCUMSTANCES..... 9

POINT IV: THE DISTRICT COURT'S RULE 55(b)(2) DECISION CONSTITUTED REVERSIBLE ERROR SINCE PLAINTIFFS DID NOT ESTABLISH THAT DEFENDANTS' COUNSEL WAS GUILTY OF GROSS NEGLECT AND DEFENDANTS' PROFERRED A SUFFICIENT SHOWING OF MERITORIOUSNESS IN OPPOSITION TO PLAINTIFFS' 55(b)(2) REQUEST..... 12

POINT V: THE EQUITABLE CONSTRAINTS OF RULE 55 AND 60(b)(1) REQUIRED THE DISTRICT TO WEIGH ALL THE EQUITIES AND NOT JUST MAKE A NARROW DETERMINATION ON "EXCUSABLE NEGLECT"..... 16

POINT VI: EVEN IF THIS COURT WERE TO FIND THAT DEFENDANTS' COUNSEL'S NEGLECT WAS INEXCUSABLE THE DISTRICT COURT'S SANCTIONS CONSTITUTED A CLEAR ABUSE OF DISCRETION SINCE DEFAULT AND DISMISSAL JUDGMENTS ARE ONLY JUSTIFIABLE UNDER EXTREME CIRCUMSTANCES..... 21

Page

POINT VII: AN ABUSE OF DISCRETION IN REFUSING TO SET ASIDE A DISMISSAL OR DEFAULT JUDGMENT NEED NOT BE GLARING TO JUSTIFY REVERSAL..... 23

TABLE OF AUTHORITIES

	Page
Alopari v. O'Leary, 154 F.2d 78 (D.C.Pa., 1957)	14
Boazman v. Economics Laboratory, 537 F.2d 210 (C.A.5, 1976).	23
Broglie v. MacKay-Smith, 75 FRD 739 (D.C. Virginia, 1977)...	23
Butner v. Neustadler, 324 F.2d 783, 786 (C.A.9, 1963)	23
Chapman v. Dreer, 14 F.R.D. 218 (D.C. Pa., 1953)	18
Colonial Drive-In Theatre Inc. v. Warner Bros. Pictures, Inc., 262 F.2d 856 (C.A.2, 1959)	6
Curran v. James Regulator Co., 36 A.2d 187 (Superior Ct. of Pa., 1944)	18
Denman v. Shubow, 413 F.2d 258 (C.A.1, 1969)	20
Dyotherm Corporation v. Turbo Machine Company, 392 F.2d 146 (C.A.3, 1968)	6
Finch v. Big Chief Drilling Co., 56 F.2d 456 (D.C. Texas, 1972)	23
Four Seasons Securities Law Litigation 63 FRD 115 (1974)	12
Horn v. Intelectron, 294 F. Supp 1153 (D.C.N.Y., 1968)	15, 23
Industrial Building Materials, Inc. v. Interchemical Corporation, 437 F.2d 1336 (C.A.9, 1971)	22
Jackson v. Beech, 636 F.2d 831 (C.A., D.C.C., 1980)	10, 16, 19, 23A,3
Keegel v. Key West and Caribbean Trading Company, Inc., 627 F.2d 373 (C.A., D.C.C., 1980)	12
Kulakowich v. A/S Borgestad, 36 FRD 185 (D.C., Pa. 1964)	12
List v. Fashion Park, Inc., 340 F.2d 457 (C.A.2, 1965), Cert Den. 382 US 811	3
Marshall, Secretary of Labor v. Segona, 621 F.2d 763 (C.A.5, 1980)	22

Medunic v. Lederer, 533 F.2d 891, 893 (C.A.3, 1976)..... 16

Morris v. Charnin, 85 FRD 689 (D.C.N.Y. 1980)..... 23

Reizakis v. Loy, 490 F.2d 1132 (C.A.4, 1974)..... 22

Rinieri v. New Syndicate Co., 385 F.2d 818 (C.A.2, 1967)..... 10

Schneider v. American Export Lines, 293 F. Supp. 117 (D.C.N.Y., 1968)..... 21

Secur. Life Ins. Co. v. Gorsuch, 323 F.2d 839 (C.A.9, Ariz., 1963); Cert. Denied 376 U.S. 950..... 9

Security Trust & Savings Bank of San Diego v. Walsh, 91 F.2d 481 (C.A.9, 1937)..... 9

Syracuse Broadcasting Corporation v. Newhouse, 271 F.2d 910 (C.A.2, 1959)..... 22

Terkildsen v. Waters, 481 F.2d 201 (C.A.2, 1973)..... 3

Thorpe v. Thorpe, 364 F.2d 692 (C.A., D.C.C., 1966)..... 15

Tolson v. Hodge, 411 F.2d 123 (C.A.4, 1969)..... 12

Tozer v. Krause Milling Co., 189 F.2d 242 (C.A.3, 1951)..... 15

Trueblood v. Grayson Shops of Tennessee, Inc., 32 F.2d 140 (D.C. Va. 1963)..... 14, 15

Vindigni v. Mayer, 441 F.2d 376 (C.A.2, 1971)..... 18

Wallace v. DeWerd, 47 FRD 4 (D.C., Virgin Islands, 1969)... 23

Weller v. Socony Vacuum Oil Co. of New York, 2 FRD 158 (D.C., N.Y. 1941)..... 9

SECONDARY AUTHORITIES

29 ALR Fed. pages 28-30..... 12

15 ALR Fed. page 216..... 10

Code of Professional Responsibility, ABA §EC-7-28..... 18

This index does not include the cases cited in Appellees' brief which were distinguished herein.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-7177

JOHN F. MEEHAN AND ROBERT W. FINK
d/b/a MEEHAN & FINK,

Plaintiffs-Appellees,

- against -

JOHN SNOW AND JUDY SNOW,

Defendants-Appellants.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

ARGUMENT

POINT I

THE NEW ISSUES RAISED BY PLAINTIFFS IN THEIR APPELLATE BRIEF SHOULD NOT BE CONSIDERED BECAUSE THEY WERE NOT RAISED BELOW

Despite the fact that plaintiffs, in support of their Rule 55(b)(2) motion and in opposition to defendants' Rule 60(b)(1) motion, relied almost exclusively on their assertion that defendants' claims were baseless[1] and despite

---

1. See A65-A68, A98-A102, A163-A165, A168-A214.

the fact that it was plaintiffs' position below that they could "not take issue with defendants' excuse for default"[2] they now claim that the District Court's decisions were justifiable because both the defendants and their counsel (allegedly) engaged in a continuous course of dilatory conduct in the defense of plaintiffs' claims and in pursuit of defendants' counterclaim. To support this contention plaintiffs michievously slanted innocuous events, curiously deleted reference to plaintiffs' own conduct which by plaintiffs' erroneous standards constituted improper dilatoriness, made false statements of facts and law, and improperly introduced questions of fact and law which were not presented to the District Court.

The following two alleged contentions made in appellees' brief were not raised by plaintiffs below nor addressed by the District Court:

1) defendants failed to insure that their attorney was diligently pursuing their defense and counterclaim;[3]

2) the fact that defendants' counsel did not initiate discovery constituted improper dilatoriness.

Plaintiffs were obligated to raise these contentions which raise factual issues, and are inconsistent with the position

---

2. See A105; A66.

3. Defendants' counsel continuously asserted below that he was responsible for the default in pleading (A61-A62) and that defendants themselves were not negligent (A161). The plaintiffs until now, never took issue with these assertions nor did they ever allege that defendants' were themselves negligent in any other manner.

they asserted below, to the District Court. Since they failed to do so, plaintiffs should be foreclosed from raising these new issues on appeal. List v. Fashion Park, Inc., 340 F.2d 457, (C.A.2, 1965), Cert. Den. 382 US 811. Foreclosure is particularly apt here, since these contentions could have been rebutted below and raise substantial questions of fact and law[4] which the District Court could have considered in order to facilitate a more informed consideration by the Court of Appeals. See Terkildsen v. Waters, 481 F.2d 201 (C.A.2, 1973).

POINT II

PLAINTIFFS' CONTENTION THAT BOTH DEFENDANTS AND THEIR COUNSEL ENGAGED IN A CONTINUOUS COURSE OF DILATORY CONDUCT IS BASED ON IRRELEVANT, MISLEADING AND FALSE ALLEGATIONS

Even if this Court were to recognize plaintiffs' new contentions the District Court's determinations would still be unjustifiable. Plaintiffs' first new claim that defendants' were personally negligent for not monitoring their attorney is fallacious. The fact of the matter is that defendants corresponded with their counsel frequently during the entire suit, supplied their counsel with voluminous information, and closely followed the development of their case. They only learned of the default in pleadings immediately after it occurred and were in no way responsible for counsel's

---

4. For instance 1) Did defendants watch over their counsel? 2) Did defendants' counsel have good reasons for not initiating discovery prior to the default? 3) What legal effect if any should be given to the discovery issue under the instant circumstances?

failure to untimely plead. This brief will demonstrate that this was the only violation of procedure allowed by defendants' counsel.

Plaintiffs' second new contention, that defendants did not initiate discovery[5] is accurate but not meaningful, as defendants' counsel had good reason for not having initiated discovery prior to the default in pleading. Defendants' answered plaintiffs' original complaint and counterclaimed on December 19, 1975. Thereafter defendants' counsel courteously granted plaintiffs numerous extensions to answer, which they finally did on February 3, 1976. Defendants' counsel exercised prudent practice to await joinder of issue and receipt of plaintiffs' reply in order to ascertain plaintiffs' position on the counterclaim before initiating discovery. Along with plaintiffs' answer, plaintiffs annexed thirty-eight detailed interrogatories on defendants' counterclaim. Preparing an answer to these voluminous interrogatories took precedence over initiating discovery. Within two months of serving the interrogatories plaintiffs moved the court to amend their complaint. Preparing defendants' opposing papers to the motion which, if granted, would (and did) add two additional claims against defendants, superceding the entirety of the original answer and reply to defendants' counterclaim, also properly took precedence over initiating discovery. This was particularly true in light of de novo nature of the prospective amended complaint.

---

5. Plaintiffs failed to mention that they did not initiate any discovery on their own causes of action. (See A2). The interrogatories propounded by plaintiffs were on defendants' counterclaim

In addition, no magistrate was assigned to the relatively young case in order to schedule discovery and the District Court never rebuked or warned either side for failing to initiate discovery. In light of these circumstances, defendants' counsel's "inaction" was totally justifiable and did not violate any rule of procedure. Therefore, the discovery issue should not tilt the equities against defendants.[6]

In addition to the above mentioned new allegations, plaintiffs asserted in their appellate brief other alleged improper conduct which plaintiffs briefly mentioned below. First, the plaintiffs cite the fact that defendants were given three extensions prior to answering plaintiffs' original complaint.[7] However, plaintiffs themselves agreed to these short extensions which were stipulated by counsel and should not be heard now to say they were improper. The extra time was needed to respond to complicated claims which were based on many intricate legal documents and on numerous transactions taking place over a two year period. The fact that defendants lived in Pennsylvania, which made communication between counsel and

---

6. It also should be noted that appellees did not cite any cases wherein a court considered "inaction" similar to defendants' counsel's, relevant to Rule 55(b)(2) and 60(b)(1) motions.

7. The plaintiffs neglected to note that both parties courteously granted numerous extensions to each other. Defendants' gave plaintiffs over a month and a half to reply to defendants' counterclaim. (see A2).

client more difficult, also justified the short extensions. Again, it must be stressed that the defendants did timely answer plaintiffs' original complaint.[8]

Plaintiffs' claim that the fact that defendants did not bring forth their claim until September of 1975 constitutes dilatoriness, is both irrelevant and of no substance.[9] In determining Rule 55(b)(2) and 60(b)(1) motions, courts should not, and have not looked to events occurring prior to the institution of the suit. However, even if such events were to be deemed relevant, the defendants were certainly justified in giving plaintiffs a chance to mitigate the harm plaintiffs' negligence caused and in bringing forth their suit within months of the time that plaintiffs and defendants terminated their attorney-client relationship.

The plaintiffs also support their allegation that defendants' counsel engaged in a continuous course of improper conduct, by claiming that defendants' counsel was in default

---

8. The fact remains that the one event which substantially slowed up the entire case and nullified much of the work product of both parties was plaintiffs' amended complaint which was served over one year after plaintiffs' instituted their cause of action based on facts which were present prior to their suit. Such delays, caused by the party seeking dismissal, have been considered to be important factors leading to the reversal of lower court dismissals for failure to prosecute. See Colonial Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., (1959, C.A.2, N.Y.), 262 F.2d 856 and Dyotherm Corp. v. Turbo Machine Co., (1968, C.A.3, Pa.), 392 F.2d 146, where the court noted in reversing the lower court's dismissal that some of the many trial delays had been occasioned by defendants' own motions for reconsideration, for permission to amend the answer and for permission to file a counterclaim.

9. No doubt plaintiffs raise this issue not to demonstrate dilatoriness but to smear defendants' meritorious defense and counterclaim. This indirect attack is especially reprehensible in light of plaintiffs' belated unfounded retaliatory defamation claims.

in answering plaintiffs' interrogatories on defendants' counterclaim, for seven months (Appellees brief, page 10, 15)[10]. This allegation is both deceptively misleading and false.

The allegation is decpetive because plaintiffs neglected to inform the Court that they themselves agreed to give defendants until September 24, 1976 to answer the interrogatories. This extension was neither unusual or improper in light of the circumstances enumerated previously.[11] (See supra at pages 4-6). If plaintiffs considered defendants' counsel's requests for additional time improper, they should have requested a court order. Instead they agreed to the extension.

---

10. It should be noted that all of the alleged improper conduct asserted by plaintiffs (except for the default in pleadings) relate to the dismissal of the defendants' cause of action and not the imposition of the default. Therefore, the fact remains that the defaults on plaintiffs' claims can only rest upon the ten day untimely answer. (See Memorandum Decision, on defendants 60(b)(1) motion, A239 - A242).

11. Despite these circumstances, defendants and their counsel did in fact prepare answers to all the interrogatories within the alloted time but properly chose not to serve the answers to the interrogatories because the interrogatories were nullified by plaintiffs' amended complaint and were never reserved upon defendants.

    If this court were to rule that defendants' amended complaint did not nullify defendants' cause of action and plaintiffs' interrogatories on that claim, but only nullified defendants' defense, then defendants' original counterclaim would still be valid and the dismissal of defendants' counterclaim would have to be reversed on that basis.

The allegation is also false, because plaintiffs' amended complaint served on September 15, 1976 voided plaintiffs' interrogatories which were due on the 24th, i.e. defendants' did not default on answering the interrogatories.

The fact that no default in answering the interrogatories had occurred and that the extensions requested were proper, (probably) led the District Court to justifiably not rely on the issue of the interrogatories[12] (or any other of plaintiffs' allegations other than the default in pleading) in its denial of defendants' Rule 60(b)(1) motion. (See A239-A242). Therefore, despite appellees' attempt to muddy the waters with issues not raised below, and with false and misleading accusations, the District Court's decisions should rest or fall on whether a ten day untimely answer[13] should have engendered the institution of the default, the dismissal and the denial of Rule 60(b)(1) relief.

---

12. In fact, the District Court only mentioned the interrogatories once as an aside in its Rule 55(b)(2) determination.

13. Plaintiffs' innuendo that defendants' counsel fraudulently backdated the affidavit of service (appellees brief, page 5) is unfounded. To support this false allegation, appellees noted that defendants' counsel had not promptly filed his answer and that the envelope was postmarked October 14. However, counsel is not required to promptly file and counsel for both sides in this action on numerous occasions did not file promptly. (See A2-A3). As for the delay in mailing it was no doubt caused by a mix up in the mail. In fact, although defendants' counsel mailed the answer from his mid-town office the envelope containing the answer was postmarked "Bronx", (A79). This indicates that the envelope was no doubt temporarily misdirected and delayed by the postal service.

POINT III

THE DISTRICT COURT'S APPLICATION OF THE WRONG STANDARD TO MEASURE "EXCUSABLE NEGLECT" UNDER RULE 60(b)(1) CAUSED IT TO CAPRICIOUSLY FIND THAT A SHORT DEFAULT IN PLEADING CAUSED BY COUNSEL'S INNOCENT MISTAKE OF LAW WAS NOT EXCUSABLE DESPITE THE CIRCUIT COURT DECISIONS WHICH HAVE CONSISTENTLY FOUND THAT THE DEFAULTING PARTY WAS ENTITLED TO A FINDING OF "EXCUSABLE NEGLECT" UNDER SUCH CIRCUMSTANCES

The Circuit Courts which have dealt with lower court denials of Rule 60(b)(1) relief from a default in pleading of short duration due to mistake of law and/or office pressure have all reversed the denials. For example in Security Trust and Savings Bank of San Diego v. Walsh, 91 F.2d 481 (9th Cir., 1937), the Circuit Court overruled the trial courts default judgment on the grounds that a few days delay in answering a cross-bill of interpleader caused by defendants' attorney's mistake as to the applicable rule limiting the time for answering was "excusable neglect."[14] Similarly,

---

14. See also Secur. Life Ins. Co. v. Gorsuch, (C.A.9, 1963), 323 F.2d 839, cert. den. 376 US 980, where the Circuit Court ruled that there had been a clear abuse of discretion for failure to find defendants' counsel's mistake in the law which caused a late filing, excusable. See also, A.F. Dormeyer Company v. M.J. Sales and Distributing Co., 461 F.2d 40 (7th Cir. 1972), and all the other Circuit and District Court cases cited in appellant's brief concerning Rule 60(b)(1) (at pages 14-22). See also Weller v. Socony Vacuum Oil Co. of New York, 2 FRD 158 (D.C.N.Y. 1941), where the District Court found defendant's counsel's failure to answer a bill of particulars for over six months in violation of a court order, excusable under Rule 60.

in Jackson v. Beech, 636 F.2d 831 (C.A., D.C.C., 1980), the Circuit Court ruled that it was an abuse of discretion for the District Court to have found that defendant's 24-day untimely answer which was caused by "the pressure of trials and office work" (Id. at 833) was not excusable. All these Circuit Court cases followed the judicial mandate that Rule 60(b)(1) should be liberally construed. Yet appellees chose to ignore precedent and erroneously insisted, as did the District Court, that Rule 60(b)(1) is an extraordinary request which should only be granted upon a showing of exceptional circumstances. See appellee's brief page 11; A241. That strict standard exclusively applies to motions made under Rule 60(b)(6) and not to Rule 60(b)(1). Rinieri v. News Syndicate Co., 384 F.2d 818 (C.A.2, 1967); See also, 15 ALR Fed. 216. Unfortunately, the District Court erroneously failed to distinguish these two rules.

To support its contention that the District Court's denial of Rule 60(b)(1) relief was justifiable appellees did not introduce any cases which were on point but instead chose to cite quotes, without delineating the the facts, from cases which were clearly materially distinguishable from the instant case.[15]

---

15. The mere recitation of the facts in the cases cited by appellees in support of the District Court's 60(b)(1) decision (Appellees brief 13-14) demonstrates their inapplicability which is probably why appellees decided not to mention the facts. In Cline v. Hoogland, 518 F.2d 776 (1975), the defaulting party had received a

15 (Continued from previous page)

decision on the merits below and failed to raise new issues of material fact in its 60(b) motion which had not previously been considered. In Hoffman v. Celebrezze, 405 F.2d 883 (1969), the time for appealing the default judgment had expired. United States v. Thompson, 438 F.2d 254 (1971), dealt with a motion under Rule 60(b)(4) or (6) and the court determined that the Rule 60 motion had not been made within a reasonable time and that even if it had been raised in time, the new ground which appellant raised on appeal was erroneous. In United States v. Erdoss, 440 F.2d 1221 (1971), the defendant's counsel made a conscious decision to agree to a default judgment. Similarly, in Benton v. Vinson, et al 255 F.2d 299 (1958), plaintiff's counsel voluntarily dismissed his clients complaint. In Hale v. Ralston Purina Company, 432 F.2d 156 (1970), plaintiffs failed to raise their 60(b) motion within the statutory one year limitation of Rule 60. In Port-Wide Container Company, Inc. v. Interstate Maintenance Corp., 440 F.2d 1195 (1971), defendant had failed to answer for over six months because the parties were negotiating and when negotiations collapsed, plaintiff's warning letter never reached defendant's attorney because of his secretary's negligence. In Flett v. W.A. Alexander & Company, 302 F.2d 321 (1962), plaintiff was granted permission to amend his complaint. This amended complaint was dismissed for failure to state a cause of action. Instead of appealing that decision directly, plaintiff chose to use the lower court's denial of its Rule 60(b) motion to appeal the dismissal. The Appellate Court ruled that it could not do this. Plaintiff's 60(b)(2) appeal was also denied because the Court found that plaintiff could have discovered the new facts with due diligence prior to its 60(b)(2) motion. In Davis v. Safeway Stores, Inc., 532 F 2d 489, (1976), defendant failed to answer plaintiff's complaint and after 37 days, a default was entered. The defendant in Davis, failed to offer an explanation or excuse for its default. In Pagan v. American Airlines, Inc., 534 F.2d 290 (1976), plaintiff and his counsel agreed to a settlement at a pretrial conference; plaintiff and his newly retained counsel then failed to show up at a hearing which they were duly notified of wherein the court approved the settlement; plaintiff's counsel then failed to appeal the final approval of the settlement within the prescribed time and then attempted to use 60(b)(1) to appeal that final settlement order 4-1/2 months after the expiration of the 60 day period provided for in the original conditional settlement order on the basis of a technical lack of notice argument despite the fact that plaintiff and his new counsel had been appraised of the conditional settlement order. It was only the cumulative effect of appellant's own neglect and his newly retained counsel which lead the court to affirm the District Court's denial of Rule 60(b)(1) relief.

Appellees' choice not to rely in its appellate brief on the numerous cases cited by the District Court below in its memorandum decision on 60(b)(1) (A239-A242), implicitly supports defendants' assertion that those cases were also inapplicable. (See appellant's brief pages 23-25).

Without authority to support the District Court's application of a narrow, harsh standard under Rule 60(b)(1) this Court should reverse the lower court's unfounded arbitrary denial of 60(b)(1) relief.

POINT IV

THE DISTRICT COURT'S RULE 55(b)(2) DECISION CONSTITUTED REVERSIBLE ERROR SINCE PLAINTIFFS DID NOT ESTABLISH THAT DEFENDANTS' COUNSEL WAS GUILTY OF GROSS NEGLECT AND DEFENDANTS' PROFERRED A SUFFICIENT SHOWING OF MERITORIOUSNESS IN OPPOSITION TO PLAINTIFFS' 55(b)(2) REQUEST

Plaintiffs could not and did not allege that defendants' counsel's neglect constituted "gross neglect" or that it was wilfull.[16] Yet, unless the moving party demonstrates willfulness or gross neglect under the more liberal standard of Rules 55(b)(2) and 55(c), District Courts have denied Rule 55(b)(2) motions for dismissal and/or default, or have been reversed by the Circuit Courts for failing to do so.[17]

---

16. In fact as previously pointed out they did not even take issue with defendants' counsel's excuse in their memorandum of law supporting their 55(b)(2) motion (A100).

17. See Tolson v. Hodge, 411 F.2d 123 (C.A.4, 1969); Kulakowich v. A.S. Borgestad, 36 FRD 185 (D.C.Pa., 1964); In r. Four Season Securities Laws Litigation, 63 FRD 115 (D.C. Okalhoma, 1974), Keegel v. Key West & Caribbean Trading Company, Inc., 627 F.2d 372 (C.A. D.C.C., 1980). See also: cases cited at 29 ALR Fed 28-30 and all the other cases cited in appellants' brief on this point at page 28-29.

Not having made the necessary demonstration in its Rule 55(b)(2) motion on the issue of excuse, plaintiffs' seek to justify the District Court's 55(b)(2) ruling on the grounds that defendants' counsel did not make the necessary showing of meritoriousness in opposition to plaintiffs' 55(b)(2) request (appellees brief at page 12). This claim is made despite the fact that defendants' counsel asserted in his affidavit that defendants' had a meritorious defense and counterclaim and proffered a detailed answer and counterclaim to support that assertion (A62)[18]. In particular, as to plaintiffs' second and third causes of action for defamation, defendants in their answer to plaintiffs' amended complaint denied making the defamatory statements which were alleged, (A110) and stated that

> "plaintiffs had a generally bad reputation at the time the words complained of were allegedly spoken by defendants." (A112).

As previously asserted in appellants' brief there is no clearer triable issue than a dispute on whether the alleged defamatory statements were in fact made. Yet plaintiffs' claim that defendants did not proffer a meritorious defense!

As to plaintiffs' first cause of action and defendants' counterclaim, defendants, amongst other denials, denied plaintiffs' performed all the terms of their agreement, (A110)

---

18. This answer was verified by defendants' counsel based on what his clients told him had occurred. (A116).

and stated affirmatively amongst other allegations, that

> "they (plaintiffs) failed to protect the rights of defendants as mortgagees and sellers of said residence, negligently carelessly and unskillfully advised and induced defendants to accommodate unreasonable requests by the said JOHN TOMECKI, failed to advise defendants of all transactions having relevance to the aforesaid matters, in that plaintiffs acted in an unprofessional manner and in dereliction of their professional responsibility to defendants in violation of their retainer...."

Defendants further alleged that plaintiffs' had breached their contract, (A110), by failing to perform skillfully as promised and by

> "willfully acting in conflict of interest ... adverse to defendants' interest" (A113-A115)[19]

Although some courts under Rules 55 and 60 go so far as to assume a meritorious defense[20] and some accept general

---

19. The three cases cited by appellees to support their conclusion that this showing was not sufficient are typically unsupportive. In Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corporation, 383 F.2d 249, 251, 252 (1967), the defendant did not proffer an answer in support of his 55(c) motion and merely alleged in a conclusary fashion that plaintiff breached his contract. Similarly, in Gomes v. Williams, 420 F.2d 1364 (1970), the defendant never proferred an answer and merely made a conclusary affirmation of a meritorious defense. In Madsen v. A.J. Bumb, 419 F.2d 4 (1969), the defendant only made a general denial in his answer and offered only conclusary statements in his affidavit supporting his Rule 60(b) motion.

20. Alopari v. O'Leary, 154 F.2d 78 (D.C.Pa., 1957), and Trueblood v. Grayson Shops of Tennessee, Inc., 32 FRD 190, 196 (D.C.Va., 1963), and the numerous cases cited therein.

denials and conclusions[21] no courts have required more than a statement of facts contained either in the motion, answer or an affidavit, which if proven would constitute a meritorious defense and counterclaim.[22] Defendants proferred answer clearly satisfied all three standards.[23] Therefore, the District Court's failure to find in its Rule 55(b)(2) determination that plaintiffs had not demonstrated the necessary degree of neglect required for a 55(b)(2) request and its failure to find that defendants' had proffered a sufficient showing of meritoriousness on their defense and counterclaim in opposition to plaintiffs' Rule 55(b)(2) motion, constituted an abuse of discretion. If this abuse is not reversed plaintiffs will receive over $17,000 for their unfounded claim of defamation and for their negligent services, which is precisely the evil that Rule 55(c) and 60(b)(1) was designed to prevent.[23A]

---

21. Tozer v. Krause Milling Co., 189 F.2d 242 (3rd Cir. 1951). Thorpe v. Thorpe, 364 F.2d 692 (C.A., D.C.C., 1966) and cases cited in Trueblood at 196.

22. See cases cited in Trueblood at 196.

23. Appellees throughout have also supported their assertion that defendants' did not make a sufficient showing on the merits by proffering their version of the facts. (A65-A68; A168-185, Appellees brief at pages 3-4); These assertions were also countered below by defendants (A30-A37, A124-154; A219-A229). In any event, plaintiffs' review of the merits are premature and misguided since, as asserted above, defendants under Rule 55(b)(2) and 60(b)(1) did not have to show that they would or could have won on the merits, but merely had to proffer defenses which if established on trial, would defeat plaintiffs' actions. See Horn v. Intelectron Corp., 294 F. Supp. 1153 (D.C.N.Y., 1968).

23A. See, Jackson at 835.

POINT V

THE EQUITABLE CONSTRAINTS OF RULE 55 AND 60(b)(1) REQUIRED THE DISTRICT COURT TO WEIGH ALL THE EQUITIES AND NOT JUST MAKE A NARROW DETERMINATION ON "EXCUSABLE NEGLECT"

As previously asserted in appellants' brief the District Court's failure to give credit to the defendants' for proffering a detailed voluminous demonstration of the merits in support of its Rule 60(b)(1) motion, and its failure to weigh the fact that plaintiffs were not prejudiced by the default in pleading, and its failure to consider the large sums of money involved, in determining good cause under Rule 55 and excusable neglect under Rule 60(b)(1), constituted a reversible abuse of discretion. Medunic v. Lederer, 533 F.2d 891, 893 (C.A.3, 1976).[24]

In response to this ground for reversal, appellees cited four cases in which the defaulting party did not proffer any excuse for its default.[25] (Appellees brief 12, 13, 15). In such cases, wherein the defaulting party did

---

24. See also the cases appellants cited in their appellate brief at page 32 note 31 and the N.Y. District Court cases at page 33 note 33 on this point. See also, Jackson v. Beech, at 857, where the Circuit Court of the D.C.C. reversed the District Court's denial of 60(b)(1) relief because it ruled that:

> "The trial court should have considered the wilfullness of the default, the possibility of prejudice to the plaintiff if the default were set aside and the merit of defendants' defense."

25. Dolphin Plumbing Co. of Florida, Inc. v. The Financial Corporation of North America, 508 F.2d 1326, 1327-1328 (1975); Walker v. Tilley Lamp Company Limited, 467 F.2d 219 (1972); Rutland Transit Co. v. Chicago Tunnel Terminal Co., 233 F.2d 655 (1956). Wilson v. Moore and Associates, Inc., 564 F.2d 366, 368 (1977).

not even make a minimal showing to come within Rule 55(c) or 60(b)(1), the courts were justified in not dealing with the issue of meritoriousness. However, here, defendants' counsel candidly proffered excuses (mistake of law and hectic practice) which the courts have deemed substantial. Plaintiffs also cited Central Operating Company v. Utility Workers of America, 491 F.2d 245, 252 (C.A.4, 1974) to support its proposition that it is not an abuse of discretion for a court to refuse to consider the defaulting party's showing of meritoriousness upon denial of a 60(b)(1) motion even though the 4th Circuit explicitly found there that "defendants probably made a sufficient showing...." on excusable neglect and "that he had a meritoriousness defense" i.e. the Court did consider meritoriousness and affirmed the denial only because defendant did not make the motion within (the statutory requiried) "reasonable time." Which leaves Smith v. Stone, 308 F.2d 115 (1962), wherein plaintiff's counsel decided to go on a vacation rather than show up to a scheduled hearing which he had already missed once after being given two continuances. It was only this extraordinary demonstration of disrespect for the court which lead the reviewing court not to consider the merits in affirming the denial below. Since no such circumstances

existed here the equitable constraints of Rules 55 and 60(b)(1)[26] required the District Court to weigh all the equities and not just make a narrow strict determination on "excusable neglect." Therefore, its rulings which were made without considering all the equities must be reversed under Medunic.

The District Court also failed to give due heed to the fact that plaintiffs Meehan and Fink who are lawyers themselves, acting pro se, failed to warn defendants' counsel, so as to prevent default, in derrogation of custom and the Code of Professional Responsibility.[27]

---

26. See Chapman v. Dreer, 14 FRD 218, 219 (D.C. Pa., 1953), where the District Court in granting defendant's motion to set aside the default stated:

> "The relief sought is essentially equitable in nature and the trial court must consider whether any prejudice would result to plaintiff if the default were set aside."

27. Code of Professional Responsibility, ABA, §EC-7-38 requires that a lawyer

> "follow local customs of courtesy unless he gives timely notice to opposing counsel of his intention not to do so."

Opposing counsel clearly breached this canon despite the fact that prior to this breach counsel for both sides engaged in continuous correspondence. See also Vindigni v. Meyer, 441 F.2d 376 (CA2, 1971); and Curran v. James Regulator Co., 36 A.2d 187 (Superior Court of Pa., 1944), where in reversing a default judgment the superior court severly criticized appellees for failing to warn by stating:

The District Court also failed to give proper weight to the fact that defendants were not personally responsible for the default in pleading[28] and to all the other equities

---

27. (Continued from previous page.)

> "We assume, therefore, because a high sense of moral obligation would impel that by custom, one member of that bar would not, except in the rarest circumstances apply for a default judgment without giving to his opponent fair notice of his intention to do so and an opportunity to be heard. This court never quashes or dismisses an appeal for failure to comply with the rules without inquiring of counsel who makes the application whether his opponent has been notified. And unless we are informed that the opponent consents, we defer action until he is given an opportunity to appear. If appellant's counsel of record was present in court when the motion for judgment was made and his petition was not called, it was, in our opinion, an aggravation of the failure not to warn him in advance. Counsel for appellee has, throughout, shown a lack of the professional spirit which, transcending the requirements of the letter of the law, has characterized, and in so doing has progressed with greatness, our profession. The dereliction of appellant's counsel in the present case was entirely without culpability and prejudiced none of appellees rights, yet the advantage taken of it, first thwarted, might subject a reputable member of the bar to liability to his client for a large sum of money and the impairment of his professional standing."

28. See Jackson at 837, where the Circuit Court ruled that it was:

> "improper to impute the conduct of the attorney to his clients"

in considering a 60(b)(1) motion because:

> "(d)efault judgments were not designed as a means of disciplining the bar at the expense of a litigants day in court."

enumerated in appellants fourth ground for reversal (appellants brief, page 35) ignored by appellees, which clearly outweighed the interest of judicial efficiency in the instant case.[29]

Unfortunately, the District Court erroneously disagreed as it asserted that the default and dismissal judgments (which were based on a ten day delay which the court would probably have extended upon request) were necessary in order to protect the "orderly administration of justice." (A241) Yet, as noted in appellants' brief Judge Werker's decisions predictably lead to a drawn out judicial process on the assessments of damages - a process which a jury could have completed in a few hours. Unless reversed, its decisions will also void all the preparation for this trial. Additionally, without reversal, a prospective malpractice suit may ensue against their present counsel which would consume more of the trial court's time litigating the same substantive issues which should have been resolved long ago on the merits against

---

29. It should be noted that all of the above enumerated grounds for reversal apply both to the default and to the dismissal without prejudice judgments since as is demonstrated above, defendants were entitled to be excused from the default in pleading under Rule 55 and were entitled to a finding that counsel's neglect was excusable under Rule 60(b)(1) as a matter of law and because it was an abuse of discretion as a matter of law for the lower court to have made its Rule 55 and 60 determinations without considering all the equities. See also Denman v. Shubow, 413 F.2d 258 (C.A.1, 1969), wherein the plaintiff unintentionally missed his call for assignment and acted promptly to remedy the situation and the Circuit Court reversed the dismissal without prejudice judgment.

opponents -- Mr. Meehan and Mr. Fink.[30] Thus, the lower court's ruling neither served judicial economy nor justice but did impede the FRCP's goal -- to resolve disputes on the merits and not on technicalities.[31]

POINT VI

EVEN IF THIS COURT WERE TO FIND THAT DEFENDANTS' COUNSEL'S NEGLECT WAS INEXCUSABLE THE DISTRICT COURT'S SANCTIONS CONSTITUTED A CLEAR ABUSE OF DISCRETION SINCE DEFAULT JUDGMENTS AND DISMISSALS ARE ONLY JUSTIFIABLE UNDER EXTREME CIRCUMSTANCES

In following plaintiffs' tendency to ignore authority and arguments instead of confronting them, plaintiffs' failed to respond to defendants 5th ground for reversal, i.e. that even if this court were to find that defendants' counsel's neglect was inexcusable, the District Court's determination to impose the most drastic sanction available, default, constituted an abuse of discretion. Further research has disclosed that all the Circuit Courts including the Second Circuit maintain that defaults can only be justified upon a

---

30. The fact that it is unjust to force a defendant who was free of culpability to pay thousands of dollars to a plaintiff without having an opportunity to defend on the merits and to leave the defendant with an uncertain malpractice suit in which the burden is placed on defendant to prove that but for counsel's neglect he would have obtained favorable verdicts on his defense and/or counterclaim, was given due consideration in Schneider v. American Export Lines, Inc., 293 F. Supp. 117 (D.C., N.Y., 1968), wherein the court granted 60(b)(1) relief.

31. Jackson at 835.

showing of a clear record of dilatory or contumacious behavior i.e. "extreme circumstances." See Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 970 (C.A.2, 1959).

Reviewing courts have not hesitated to reverse District Court default judgments or dismissals even where counsel's neglect was far more aggrevious than defendants' counsel's conduct in the instant case. For example in Marshall, Secretary of Labor v. Segona, 621 F.2d 763 (5th Cir. 1980), the plaintiff-U.S., on May 2, 1978 was directed by the District Court to supply the defendant with certain requested information. Thereafter, the defendant interposed interrogatories asking for the same information which the court had previously ordered the Secretary to answer. The defendant moved for dismissal after the plaintiff failed to supply answers to those interrogatories for over four months. The lower court denied the motion and gave plaintiff 30 days to answer. Plaintiffs answered 4 days after the 30 day limit expired, due in part to a miscalculation by plaintiff's counsel in determining the due date. The lower court dismissed. Although the reviewing court noted that the plaintiffs had not acted with "diligent competence" the court reversed because the District Court "improperly imposed the sanction of last resort." at 769. If the dismissal in Marshall was improper[31] the default judgments in the instant case which were not based on a long-standing failure to comply with two court orders, but were

---

31. See also Reizakis v. Loy, 490 F.2d 1132 (C.A.4, 1974); Industrial Building Materials Inc. v. Interchamical Corporation, 437 F.2d 1336 (9th Cir. 1971), and cases cited on this point in appellants' brief pages 40-41.

based on a mere ten day delay in answering an amended complaint which had been timely answered previously, was clearly on abuse of discretion[32].

It should be also noted that plaintiffs' causes of action and defendants' counterclaim deal with exactly the same transactions and occurrences and therefore the trial court's burdens would not be increased by overturning the dismissal if the default is overturned.

POINT VII

AN ABUSE OF DISCRETION IN REFUSING TO SET ASIDE A DISMISSAL OR DEFAULT JUDGMENT NEED NOT BE GLARING TO JUSTIFY REVERSAL

In the last part of Appellees' brief plaintiffs attempted to unduly narrow the standard of reviewing Rule 55 (b)(2) judgments and denials of Rule 60(b)(1) relief which are subject to close scrutiny[33].

---

32. This ground for reversal also applies to the dismissal without prejudice which nullified defendants' counterclaim in light of the fact that the overwhelming majority of District Courts who have faced similar or more aggrevious neglectful conduct have been compelled by notions of fairness and the Rules to either completely forgive the default in pleading or at the very most impose cost and/or attorney fees.

    For example: Horn Interlectron, 294 F. Supp. 1153 (D.C.N.Y. 1968); Finch v. Bey Chief Drilling Co., 56 F.2d 456 (D.C. Texas, 1972), Morris v. Charmin, 85 FRD 689 (D.C.N.Y. 1980); Wallace v. DeWerd, 47 FRD 4 (D.C., Virgin Islands, 1969); Broglie v. Mackay-Smith, 75 FRD 739 (D.C., Virginia 1977).

    Additionally, the statute of limitations has run on defendants' counterclaim so the stricter standard of "extreme circumstances" may be applied. See Boazman v. Economics Laboratory, 537 F.2d 210 (C.A.5, 1976).

33. See Butner v. Neustadler, 324 F.2d 783, 786 (C.A.9, 1963), wherein the court quoting from another case stated "...denials of such relief (60(b)(1)) are scanned more carefully than cases where the trial court has granted relief...."

Appellees accurately stated that in order to justify a reversal, a clear abuse of discretion must be shown (Appellees' brief, 17). However, the Court of Appeals of D.C.C. recently declared in Jackson at 835, that because it is inherently unfair to use the courts' power to enter and enforce judgments as a penalty for delays in filing, the strong policy of favoring the restoration of genuine disputes on their merits, an abuse of discretion in refusing to set aside default or dismissal judgments "need not be glaring to justify reversal." Although some of the District Court's errors were in fact "glaring" each independent ground for reversal certainly was sufficiently erroneous to constitute a reversible abuse of discretion under Jackson. The cumulative effect of these abuses imposed a severe injustice upon defendants which can only be remedied by a reversal.

CONCLUSION

The decisions below should be reversed, the default judgments and dismissal should be vacated, and the case should be remanded to the trial court's docket.

Respectfully submitted,

VOGEL & ROSENBERG
Attorneys for Defendants-Appellants
41 East 42nd Street
New York, New York 10017
(212) 599-3337

Donald B. Rosenberg

OF COUNSEL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

Docket No. 77-7177

JOHN F. MEEHAN and ROBERT W. FINK d/b/a MEEHAN & FINK,

Plaintiffs-Appellees,

- against -

JOHN SNOW and JUDY SNOW,

Defendants-Appellants.

AFFIDAVIT OF SERVICE

- X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ELAINE BURTON being sworn says: I am not a party to the action, am over 18 years of age and reside at Queens, New York.

On May 5, 1981, I served two (2) copies of the annexed Reply Brief of Defendants-Appellants in the following manner: by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

McCann, Rider, Drake, Weiner, Somers
and Loeb, P.C.
427 Little Britain Road
Post Office Box 991
Newburgh, New York 12250

ELAINE BURTON

Sworn to before me this
5th day of May, 1981.

DONALD B. ROSENBERG
Notary Public, State of New York
No. 60-3350450
Qualified in Westchester County
Commission Expires March 30, 1983